IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 15TH JUNE 2007 / 25TH JYAISHTA 1929

SA.No. 859 of 1993()

AGAINST THE JUDGMENT AND DECREE DT. 29.06.1993 IN AS.113/1992 of II ADDL.DISTRICT COURT,ERNAKULAM
OS.236/1990 of PRINCIPAL SUB COURT,ERNAKULAM

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APPELLANTS: AAPPELLANTS/ DEFENDANTS
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1. **JACOB, AGED 40 YEARS,**
   S/O. JOSEPH,
   KAITHAVELIKKAKATH HOUSE,
   PANDIKUDY, KOCHI 2.

2. **MRS. VIRONI MERCY JACOB,**
   AGED 30 YEARS, KAITHAVELIKKAKATH HOUSE,
   PANDIKUDY , KOCHI 2.

BY ADV. SRI T. A. NARAYANAN NAIR

RESPONDENT: RESPONDENT/ PLAINTIFF

K.J. ALEX, S/O. JOSEPH, AGED 42 YEARS,
KAITHAVELIKKAKATH HOUSE, PANDIKUDY
KOCHI 2.

BY ADV. SRI .A .VIJAYAKUMAR

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 15/ 06 /2007 , THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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S.A. NO.859 OF 1993

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Dated this the 15th day of June, 2007

JUDGMENT

The defendant in O.S.236/1990 on the file of Sub Court, Cochin are the appellants. Respondent is the plaintiff. First appellant and respondent are direct brothers. Second appellant is the wife of first appellant. First appellant and the respondent were admittedly partners of a partnership firm by name 'Tettan Engineering'. O.S.24/1985 was filed by the respondent for dissolution of the partnership firm. Suit was decreed. While the suit was pending, first appellant was appointed as party receiver. In the suit, respondent filed I.A.343/1989 and I.A.344/1989 contending that first appellant who was appointed the receiver had misappropriated the amount due to the firm. The Court by Ext.A1 order dated 17.11.1989 found that the first appellant is liable to account for Rs.84,517.44 and directed him

to deposit the amount. Though it was challenged before this court, the order was confirmed under Ext.A2 order. Respondent also filed an application before the trial court in that suit seeking permission to institute a suit contending that first appellant purchased the plaint schedule property in the name of his wife, second appellant using the funds of the firm. Permission was granted. O.S.236/1990 was filed thereafter contending that plaint schedule property having an extent of 10 ccents was purchased by first appellant in the name of his wife, second appellant utilising the funds of the firm which was with the first appellant while he was appointed as receiver by the court. It was also contended that though the document is in the name of second appellant, first appellant is the real owner of the property and it is therefore available to the partnership firm and respondent is entitled to a share in the property.

2. Appellants in the written statement denied the case of misappropriation or purchasing the property by the first appellant(first defendant) in the name of the second appellant/second defendant contending that the property was purchased by second defendant out of her own funds and not with the funds of the first appellant. It was also contended that first appellant has not misappropriated any amount and in any case the suit is barred under section 4(1) of the Benami Transactions (Prohibition) Act, 1988 (hereinafter referred to as the Act). Trial Court framed the necessary issues. On the evidence of PW1, DW1 and Exts.A1 to A6, learned Sub Judge found that first appellant was appointed the receiver in O.S.24/1985 and acquisition of the plaint schedule property was while he was appointed the receiver in that suit. Learned Sub Judge on the evidence also found that in O.S.24/1985 first appellant had to account Rs.84,517.44 as evidenced by Exts.A1 and

A2 orders. It was also found that though acquisition of the plaint schedule property was in the name of second appellant, the funds for the acquisition and the consideration for the sale was not by the second appellant but by first appellant. On these findings learned Sub Judge held that the property was purchased by first appellant though it was in the name of second appellant. Relying on the decision of the High Court of Orissa in **Gopal Bariha v. Sathyanarayan Das and others (A.I.R. 1991 Orissa)** learned Sub Judge held that the suit is not barred under section 4(1) as respondent is a stranger to the transaction and not the real owner. Appellants challenged the decree and judgment before Additional District Court, Ernakulam in A.S.113/1992. Learned Additional District Judge on reappreciation of evidence found that the factual finding of the trial court that consideration for the purchase of plaint schedule

property came not out of the funds of the second appellant wife but of the first appellant husband was confirmed. The learned Additional District Judge also found that the amount utilised for purchase of the property was the amount which was with the first appellant in his capacity as receiver appointed by the court in O.S.24/1985. Learned Additional District Judge therefore held that the property shall enure to the benefit of the firm. The finding of the learned Sub Judge that Section 4(1) of the Act has no application on the facts of the case was affirmed and the appeal was dismissed. It was challenged in the Second Appeal.

3. Second Appeal was admitted formulating the following substantial question of law involved in the Second Appeal.

Whether the finding of courts below that plaintiff is a stranger and therefore suit is not barred by the provisions of Benami Transactions (Prohibition) Act, is sustainable?

4. Learned counsel appearing for the appellants and respondent were heard.

5. The arguments of the learned counsel appearing for the appellants was that courts below erred in interpreting Section 4(1) of the Act in the light of the factual matrix of the case. Relying on the Full Bench decision of this Court in **Bhargavy v. Janaki (1994(2) KLT 262),** learned counsel argued that the transaction involved in this case is a tripartite transaction which is held to be covered under section 4(1) of the Act by the Full Bench and therefore courts below should have held that the suit is not maintainable. It was also argued that the suit itself was instituted claiming that along with first appellant brother, respondent is the owner of the property as it was purchased benami in the name of second appellant and therefore being the real owner, respondent is not entitled to challenge the document as benami in view of section 4(1) the provisions of the Act

which prohibits raising such a plea and therefore suit is not maintainable. Learned counsel appearing for respondent argued that both the courts have appreciated the case in the proper perspective and there is no reason to interfere with the concurrent judgment.

6. The factual finding entered by the trial court and affirmed by the first appellate court cannot be interfered in exercise of the powers of this Court under section 100 of the Code of Civil Procedure by reappreciating the evidence as canvassed by the learned counsel appearing for appellants. On the evidence, factual findings were arrived that plaint schedule property was acquired with the funds of the firm available with the first appellant, in his capacity as the party receiver appointed by the court in O.S.24/1985 and though the document stands in the name of second appellant wife, the consideration was not paid by the second appellant but by the first appellant out

of the findings of the firm with him. Therefore if the suit is not hit by the provisions of the Act, there is no ground to interfere with the decree and judgment passed by the courts below.

7. The question is whether the suit is barred by the provisions of Section 4(1) of the Act.

8. Section 4(1) of the Act reads:-

> "No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

Analysing Section 4(1), Full Bench of this Court in **Bhargavi's case (supra)** held that the interpretation given to Section 4(1) in **Ouseph Chacko v. Raman Nair (1989 (1) KLT 767)** that sham

transaction do not come within the purview of the Act is the correct law. Full Bench analysed both types of benami transactions. First is the benami transaction when A purchases the property from B, but shows the name of C, another person as the purchaser and C is the benamidar. Such transaction is called the real benami transaction. In such a transaction there is a real transfer. The second is only a sham and nominal document by which the right has not been transferred at all. It is called "loosely" as benami transaction. The first is tripartite transaction and the second bipartite transaction. The Full Bench was considering whether the bar provided under section 4(1) would apply to the bipartite transaction as held by a learned single Judge in Ouseph's case. Affirming the decision of the learned single Judge, it was held that section 4(1) applies to only tripartite transactions.

9. What is provided under section 4(1) is that

no suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property. Section 4 has to be appreciated along with the prohibition provided under section 3. Section 3 provides that no person shall enter into any benami transaction. So what is provided under section 4 is that a person who has entered into a benami transaction or any other person on his behalf is not entitled to institute a suit, claim or action to enforce any right in respect of that property held benami. When the very case of the respondent was that the funds of the firm which was with first appellant in his capacity as receiver was utilised for purchase of the property and the property was purchased in the name of the wife of first appellant, suit cannot be thrown out as he is one of the real owners.

10. In this case, the suit itself was filed on the basis that first appellant utilising the funds of the partnership firm, which was with first appellant in his capacity as the receiver appointed by the court, purchased the property in the name of his wife. The definite case was that though property was purchased in the name of second appellant, his wife, the property is that of the partnership firm consisting of first appellant and respondent. The specific case was that without the knowledge or consent or information of the respondent, the property was acquired utilising the funds of the firm, by the receiver appointed by the court, in the name of his wife and it shall enure to the benefit of the partners of the firm. Section 4(1) of the Act does not operate as a bar against the respondent instituting such a suit claiming his right over the property, though the document stands in the name of the wife, second appellant. Evidence establish that, though

document stands in the name of the wife, the acquisition was by the husband, utilising the funds of the firm. In such circumstances, I find no reason to interfere with the concurrent finding of the courts below.

11. Learned counsel appearing for appellants pointed out that when first appellant was directed to pay Rs.84,517.44 as the amount received by him in his capacity as receiver, he may not be liable to pay the amount utilised for purchasing the property in view of the decree. The submission is correct. When first appellant was directed to deposit Rs.84,517.44 being the amount due to the firm and as per the present decree, the property acquired by first appellant, though in the name of his wife utilising portion of that amount,was found to be that of the firm and available to the respondent along with first appellant, the consideration paid for the purchase of that property is to be deducted from the amount directed

to be deposited by him in O.S.24/1985. It is therefore made clear that while realising the amount as directed in O.S.24/1985, the consideration paid for the acquisition of the plaint schedule property as shown in the sale deed, shall be deducted and only the balance need be paid by the first appellant.

Appeal is dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A.NO.859 /93

JUDGMENT

15TH JUNE,2007